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"CHILDREN SHOULD BE SEEN AND NOT HEARD": DO CHILDREN SHED THEIR RIGHT TO FREE SPEECH AT THE SCHOOLHOUSE GATE?*

JUSTICE MARY MUEHLEN MARING**

This afternoon I would like to give you the historical background of First Amendment law and student speech as it has evolved from *Tinker v. Des Moines* (1969) to *Hazelwood v. Kuhlmeier* (1988).

I. STUDENT POLITICAL EXPRESSION IS "CLOSELY AKIN TO 'PURE SPEECH'"

The United States Supreme Court held nearly sixty years ago that students in public schools have First Amendment rights.[1] However, the modern era of free speech in the public school context was ushered in with *Tinker v. Des Moines Independent Community School District* in 1969.[2] In December 1965, a group of adults and students held a meeting at a private home and decided to publicize their objections to the Vietnam War by wearing black armbands during the holiday season.[3] John F. Tinker, fifteen years old; his sister, Mary Beth Tinker, thirteen years old; Christopher Eckhart, sixteen years old; and their parents decided to participate.[4] The principals of Des Moines public schools became aware of the plan to wear armbands, and on December 14, 1965, adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused, he would be suspended until he returned without the armband.[5]

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* This piece is an edited and annotated transcript of the speech Justice Mary Muehlen Maring delivered for the Freedom Lecture Series, sponsored by the F-M Communiversity's Freedom Lectureship Fund and the League of Women Voters, at Concordia College in Moorhead, Minnesota, on March 1, 1998.

** Justice, North Dakota Supreme Court. The author wishes to express her appreciation to her former law clerk, Aaron Dorrheim, and her current law clerk, Paul Odegaard, for their assistance in preparing this speech for publication.

1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that a state law requiring students to pledge allegiance to the American flag violates the First Amendment). The Court in *Barnette* concluded that schools must protect "Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

2. 393 U.S. 503 (1969). *Tinker* was the "first real occasion" in which the Supreme Court ruled on the issue of free speech under the First Amendment as it relates to students in elementary and secondary schools. *See generally* Richard S. Vacca & H.C. Hudgins, Jr., *Student Speech and the First Amendment: The Courts Operationalize the Notion of Assaultive Speech*, 89 Ed. LAW REP. 1, 2 (1994).

3. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 504 (1968).

4. *Id.*

5. *Id.* at 504.

On December 16, 1965, Mary Beth and Christopher wore black armbands to their schools and John wore his the next day.[6] They were all sent home and told not to return until they came back without their armbands.[7] The children did not return until after New Year's Day, after the planned period for wearing armbands had expired.[8] Through their fathers, the children filed an action in federal district court seeking injunctive relief prohibiting school officials from disciplining them.[9] The local federal district court determined that wearing an armband to express a political viewpoint was a means of expression protected by the First Amendment's free speech clause.[10] The court nonetheless upheld the school policy because it was not unreasonable to anticipate that the wearing of the armbands would create a disturbance of some type.[11] The Eighth Circuit Court of Appeals in a 4-4 decision affirmed the district court's ruling without an opinion.[12] The Supreme Court, Justice Fortas delivering the opinion of the Court, reversed both courts, recognizing that the wearing of armbands in the circumstances of this case was "closely akin to 'pure speech.'"[13]

The *Tinker* Court began its analysis by characterizing the issue before it as the murky area where "students in the exercise of First Amendment rights collide with the rules of the school authorities."[14] On the student side, the Court recognized its "unmistakable holding . . . for almost fifty years" that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] On the school side, the Court also reaffirmed the "comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[16] After recognizing these principles, the Court concluded that wearing armbands to school to express a political viewpoint clearly involved

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6. *Id.*

7. *Id.* The school's principal felt that the presence of the armbands would disturb the regular school activities even though the school had allowed students to wear other kinds of symbolic messages. *Id.* at 510. In fact, students had been permitted to wear political campaigns buttons, and some had worn Iron Crosses to school, the traditional Nazi symbol. *Id.*

8. *Id.* at 504.

9. *Id.*

10. *Id.* at 504-05.

11. *Id.* at 505.

12. *Id.*

13. *Id.* The Court concluded that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06.

14. *Id.* at 507.

15. *Id.* at 506.

16. *Id.* at 507.

"direct, primary First Amendment rights akin to 'pure speech.'"[17] Before the Court resolved the conflict between the students and school officials, it laid out some foundational principles. First, the Court recognized that students, both in and out of school, are "persons" under the Constitution.[18] Second, students "are possessed of fundamental rights which the State must respect[.]"[19] Based upon these two major premises, the Court stated that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their view."[20]

Once the Court concluded that students were afforded the constitutional protection of free speech, it established a test to determine when school regulations infringed upon a student's First Amendment rights. Specifically, the Court held: 1) the State must have "more than a mere desire to avoid the discomfort and unpleasantness [of] an unpopular viewpoint";[21] and 2) the school regulation can infringe only where the forbidden conduct would "materially and substantially interfere" with the work of the school or impinge on the rights of other students.[22] The Court decided that where facts are not demonstrated which might reasonably lead school authorities to forecast material and substantial disruption of school activities, a rule prohibiting the wearing of armbands could not be sustained.[23]

Turning to the facts of the case, the *Tinker* Court determined that the banning of armbands was directed only at the Tinkers' viewpoint because school officials had not prevented students from wearing Iron Crosses or political buttons on previous occasions.[24] The Court found the banning of a singular viewpoint particularly offensive to the First Amendment.[25] The Court also asserted that the record did not "demonstrate any facts which might reasonably have led school officials to forecast substantial disruption of or material interference with school activities[.]"[26] Rather, the Tinkers' conduct was "a silent, passive expres-

17. *Id.* at 508.
18. *Id.* at 511.
19. *Id.*
20. *Id.*
21. *Id.* at 508-09.
22. *Id.* at 514.
23. *Id.* In discussing what level of protection such speech is afforded, Justice Fortas first reviewed the importance of the interaction between the Constitution and public schools. He found that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the market place of ideas." *Id.* at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1965)).
24. *Id.* at 510-12.
25. *Id.* at 510-11.
26. *Id.* at 514.

sion of opinion, unaccompanied by any disorder or disturbance[.]"[27] Finding that any disruption resulting from the wearing of the armbands was minimal, the Court ruled that the Tinkers' form of expression was afforded all of the protections of the First Amendment.[28]

The Court's discussion of two Fifth Circuit Court of Appeals cases demonstrates its acknowledgment that these case are highly fact-specific. The Court cited two factually similar Fifth Circuit cases which reached opposite results due to the presence or lack of material or substantial interruption with school activities.[29] The discussion of these cases demonstrates the Court's particular focus on the results or effect of the form of student expression.[30] The essence of the *Tinker* holding is that if a student's expressive activity does not materially disrupt the school environment, deference will be given to the student's First Amendment rights. However, if the expressive activity materially disrupts the school environment, school officials will be given broad authority to restore order. The key point is that the focus of the First Amendment analysis is on the result or effect of student expression.

II. THE SUPREME COURT CHANGES ITS FOCUS IN *FRASER*

"The next major post mark in the evolution of student speech occurred in 1986 in *Bethel School District Number 403 v. Fraser*,"[31] a 7-2 decision in favor of the school district. Focusing its attention primarily on the content of the student's expression, the *Fraser* Court held that school officials can punish a student for "offensively lewd and indecent" speech in the schoolhouse.[32] Matthew Fraser was a student at Bethel High School in Pierce County, Washington.[33] He delivered a nominating speech for a fellow student for a student office at a voluntary assembly.[34] The assembly was held during school hours as part of a

27. *Id.* at 508.

28. *Id.* at 508-09, 514.

29. In *Burnside v. Byers*, 363 F.2d 744 (5th Cir. 1966), students were disciplined for wearing freedom buttons. The Fifth Circuit held that the students could not be disciplined for wearing the buttons because they caused no disruption to the school environment. *Burnside*, 363 F.2d at 746 . However, in *Blackwell v. Issaquena Cty. Bd. of Ed.*, 363 F.2d 749 (5th Cir. 1966), the students who wore freedom buttons harassed the students who chose not to wear buttons, thereby disrupting school activities. As such, school officials were justified in regulating the wearing of the buttons.

30. *See* Vacca & Hudgins, Jr., *supra* note 4, at 3 (stating that the Justices paid scant attention to the content of the speech; rather, they relied on the test of what happened because of the speech. Finding that any disruption or disturbance resulting from the wearing of armbands was minimal, the Supreme Court ruled that students were within their rights under the First Amendment for engaging in the questionable speech).

31. 478 U.S. 675 (1986) (quoting Vacca & Hudgins, *supra* note 2, at 4).

32. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

33. *Id.* at 677.

34. *Id.*

school-sponsored educational program in self-government and was attended by approximately 600 students, many of who were fourteen years old.[35] The entire speech included references to his candidate in terms of elaborate, graphic, and explicit sexual metaphors.[36] During the speech, some of the students hooted and yelled, some mimicked the sexual activities alluded to in the speech, and others appeared embarrassed.[37]

The next morning, the assistant principal called Fraser into her office and told him that his speech violated the school's "disruptive-conduct" rule.[38] This rule prohibited conduct that substantially interfered with the educational process, but included a provision prohibiting the use of obscene or profane language or gestures.[39] Fraser admitted that he deliberately used sexual innuendo in his speech.[40] He was suspended for three days and was told that his name would be removed from the list of candidates for graduation speakers.[41] The school district's grievance procedures resulted in affirmance of the disciplinary action. However, Fraser was allowed to return to school after only two days of suspension.[42] Fraser's father filed suit on Fraser's behalf in federal district court, alleging that the sanctions violated the First Amendment and that the school rule was unconstitutionally vague and overbroad.[43] The district court agreed and enjoined the school district from preventing Fraser from speaking at graduation and awarded monetary relief.[44] The Ninth Circuit Court of Appeals affirmed, holding that the speech was indistinguishable from the protest armbands in *Tinker*.[45] The Supreme Court reversed.[46]

The *Fraser* Court began its analysis by reaffirming *Tinker's* caveat that public school students "do not 'shed their constitutional rights to

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35. *Id.*

36. *Id.* at 677-78. The relevant portion of Fraser's speech is as follows:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687.

37. *Id.* at 677-78.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 678-79.

43. *Id.* at 679.

44. *Id.*

45. *Id.*

46. *Id.* at 680.

freedom of speech or expression at the schoolhouse gate.'"[47] However, the Fraser Court also noted the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech[.]"[48] The Court emphasized that the student's message in *Tinker* involved the advocation of a particular political viewpoint.[49] The Court determined that Fraser's speech was not intended to espouse a particular political viewpoint; rather, the speech was "vulgar and lewd" and therefore did not warrant *Tinker's* degree of First Amendment protection.[50]

The Court then addressed the issue of what level of First Amendment protection was appropriate for Fraser's speech. In so doing, the Court noted that Fraser's First Amendment rights must be balanced against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[51] The Court reasoned that students in public school do not have the "same latitude" to use offensive language as adults,[52] and "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[53] The Court then analogized Fraser's speech with *Ginsburg v. New York*[54] and *FCC v. Pacifica*,[55] in which the Court concluded that a state may restrict vulgar but not legally obscene speech

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47. *Id.* (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1968)).

48. *Id.*

49. *Id.* at 680.

50. *Id.* at 681-82.

51. *Id.* at 681. Specifically, the Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students.

Id.

52. *Id.* at 682. The Court quoted with approval the statement that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* (quoting Thomas v. Board of Educ., 607 F.2d 1043, 1057 (2nd Cir. 1979)) (Newman, J., concurring) (referring to Cohen v. California, 403 U.S. 15 (1971), in which the Court overturned a conviction based on the wearing of a jacket with the slogan "F[---] the Draft")).

53. *Id.* at 682. The Court pointed to *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985) for support. The *T.L.O.* case interpreted the Fourth Amendment in the context of public schools. *T.L.O.*, 469 U.S. at 327. The *T.L.O.* Court held school officials to a lesser standard than that applied to police officers, granting school officials wide latitude to conduct student searches on school grounds. *Id.* at 340, 343. Although it was a search and seizure case, *T.L.O.* was a strong indication that the Court would take a more conservative view of First Amendment rights in the public school context.

54. 390 U.S. 629, 638 (1968) (upholding a state statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults).

55. 438 U.S. 726, 732 (1978) (upholding an FCC decision to a ban a comedian's monologue described as "indecent but not obscene," in part because the monologue was "broadcast at a time when children were undoubtedly in the audience.").

which is directed at children.[56] Focusing on the fact that Fraser's speech was vulgar and lewd, as opposed to disruptive, and directed at a young audience, the Court held that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser because construing the First Amendment to permit vulgar and lewd speech . . . would undermine the school's basic educational mission."[57]

The *Tinker* Court made it clear that the constitutional protection afforded to student expression hinges on its results or effect and not so much on its content.[58] When wearing armbands did not materially or substantially disrupt school activities or affect other students' rights, the *Tinker* Court held that students had the right to engage in symbolic speech.[59] However, the *Fraser* Court took a different approach.[60] Although there was disagreement over the effect of Fraser's speech, some degree of disturbance did occur.[61] However, the effect or result of the speech was not the focus of the First Amendment analysis. Rather, it was the content of the student expression.[62]

Justice Brennan concurred in the judgment, but not with the majority's analysis because he found it "difficult to believe" that Fraser's speech was obscene or vulgar.[63] Justice Brennan concluded that Fraser's language was "far removed from the very narrow class of 'obscene' speech which the Court has held is not protected by the First Amendment."[64] Justice Brennan did concur with the majority because he believed that under the circumstances of the case, the "school officials did not violate the First Amendment in determining that [Fraser] should be disciplined for the disruptive language he used while addressing a high school assembly."[65] In other words, Fraser's speech was not entitled to constitutional protection because it came under *Tinker's* "material or substantial disruption" test, and not because his speech fell into the constitutionally unprotected category "vulgar" or "lewd" expression. Justice Brennan's concurrence clearly exposes the *Fraser* majority's shift away from the *Tinker* "material or substantial disruption" analysis.

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56. *Fraser*, 478 U.S. 684-85.
57. *Id.*
58. Vacca & Hudgins, *supra* note 2, at 6. Although the speech's effect on the audience was briefly examined, the *Fraser* Court's focus was clearly the content of the speech. Indeed, the Court's opinion focused primarily on the speech's content, the age of the audience, and the fact that the speech was given in a public school. *Fraser*, 478 U.S. at 683-84.
59. *Fraser*, 478 U.S. at 685.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 687 (Brennan, J., concurring).
64. *Id.* at 688.
65. *Id.* at 690.

III. THE SUPREME COURT DECIDES HAZELWOOD

Two years later, the Rehnquist Court by a 5-3 vote, decided *Hazelwood v. Kuhlmeier*.[66] *Hazelwood* involved the censorship of student newspaper articles which were neither lewd nor legally obscene. The Court, finding that a school-sponsored student newspaper is not a public forum for indiscriminate student use, upheld the prerogative of educators to exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.[67]

The Spectrum was a newspaper written and edited by the Journalism II class at Hazelwood East High School.[68] The Board of Education allocated funds for the printing of the newspaper and the Journalism teacher was the newspaper's adviser.[69] The practice at Hazelwood during the 1983 spring semester was to submit page proofs to the principal for his review prior to publication.[70] When the proofs of the May 13 edition were reviewed by the principal, he objected to two articles.[71] One of the stories described three students' experiences with pregnancy, and the other discussed the impact of divorce on Hazelwood students.[72]

The principal was concerned that the identity of the pregnant girls might be ascertained from the article, that the article's references to sexual activity were inappropriate for younger students, and that the divorcing parents should have been given an opportunity to respond.[73] Believing that there was no time to make changes in the articles before the printing deadline, the principal directed the two pages containing the stories on pregnancy and divorce be withheld from publication.[74] Three student staff members of the Spectrum commenced an action in federal district court against the school district, seeking a declaration that their First Amendment rights had been violated.[75]

The federal district court held that the school could impose restraints on students' speech in activities that are "an integral part of the school's education function" so long as their decision has "a substantial and reasonable basis."[76] The Eighth Circuit Court of Appeals reversed, holding that the Spectrum was not only part of the school curriculum,

66. 484 U.S. 258 (1988).
67. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 258, 273 (1988).
68. *Id.* at 262.
69. *Id.*
70. *Id.* at 263.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 264.
75. *Id.*
76. *Id.* at 264-65.

but a public forum because it was intended to be a conduit for student viewpoint.[77] The Eighth Circuit concluded that the school could not censor articles except "when necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."[78] The Supreme Court reversed the court of appeals decision and held that the Spectrum was not a "public forum," but rather part of the educational curriculum and a regular classroom activity.[79]

The *Hazelwood* Court began its analysis by again reaffirming the *Tinker* caveat that "[s]tudents in public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[80] The Court also reaffirmed the *Fraser* caveat that the "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'"[81] As it did in *Fraser*, the Court then proceeded to distinguish *Hazelwood* from *Tinker*. The first issue Justice White addressed was whether the "Spectrum may appropriately be characterized as a forum for public expression."[82] The Court found traditional public forums are created within a public school only if school officials have "'by policy or practice'" opened the school to either the general public or some segment of the general public, like student organizations.[83] Finding that the Spectrum was part of the school's journalism course and the journalism teacher exercised considerable discretion over the class, the Court concluded that school officials had reserved the forum for its intended purpose as a supervised learning experience for the students.[84] Therefore, the Court held that the school-sponsored newspaper was not a public forum, and as such was subject to reasonable restrictions by school administrators.[85]

The primary distinction the Court drew between *Tinker* and *Hazelwood* was the difference between a school-sponsored activity and a non-school-sponsored activity. While *Tinker* involved a school's toleration of "particular student speech," *Hazelwood* addressed the "affirmative pro-

77. *Id.* at 265.

78. *Id.* (citing Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372 (8th Cir. 1986)).

79. *Id.* at 270, 273-74 (citing *Kuhlmeier*, 795 F.2d at 1372).

80. *Id.* at 266 (quoting Tinker v. Des Moines Community Indep. Sch. Dist., 393 U.S. 503, 506 (1968)).

81. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)). The Court also noted that "[a] school need not tolerate student speech that is inconsistent with 'its basic educational mission' . . . even though the government could not censor similar speech outside the school." *Id.* (citing *Fraser*, 478 U.S. at 685).

82. *Id.* at 267.

83. *See id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983); Widmar v. Vincent, 454 U.S. 263 (1981)).

84. *Id.* at 268-71.

85. *Id.* at 270.

mot[ion] [of] particular student speech."[86] Since the student expression occurred in a school-sponsored forum and was affirmatively promoted by the school, the newspaper was not afforded the same level of First Amendment protection as the armbands in *Tinker*.[87] Therefore, school officials may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns."[88]

Justice Brennan filed a strong dissent, arguing that the majority's "non school-sponsored" and "school-sponsored" distinction for granting different levels of constitutional protection to student expression was not justified.[89] He reasoned that a distinction was not required because the *Tinker* test sufficiently encompassed all student speech within a public school.[90] A different standard was not necessary because, under the *Tinker* standard, school officials would still have control over student speech in school-sponsored activities because student speech is manifestly "more likely to disrupt a curricular activity—one that is 'designed to teach' something—than when it arises in the context of noncurricular activity."[91] Justice Brennan argued that by disregarding *Tinker's* analysis, the majority created a "taxonomy of school censorship."[92]

Hazelwood arguably marked further restrictions on students' First Amendment rights in the public schools. The *Hazelwood* majority gave broad authority to school principals to look away from the results or effect of speech and to determine "whether to disseminate student speech on potentially sensitive topics,"[93] when the medium of the student expression is through a school-sponsored activity, and school officials deem the message to be inconsistent with a school's basic educational mission. It was clear by the beginning of the 1990s that school officials could limit speech and expression that: 1) materially disrupted the

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86. *Id.* at 270-71. The Court stated:

> The [*Tinker*] question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The *Hazelwood* question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. at 271.

87. *Id.* at 270.

88. *Id.* at 273.

89. *Id.* at 281. "The Court does not, for it cannot, purport to discern from our precedents the distinction it creates." *Id.*

90. *Id.* at 283.

91. *Id.*

92. *Id.* at 281. Justice Brennan stated "mere incompatibility with the school's pedagogical message [is not] constitutionally sufficient justification for the suppression of student speech." *Id.* at 280. Under the Constitution, "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate." *Id.*

93. *Id.* at 272.

educational environment; 2) was vulgar or offensive; or 3) carried the school's official imprimatur.

I. CONCLUSION

Since the *Tinker* decision, the Supreme Court has progressively narrowed students' First Amendment rights to freedom of expression in public schools. Seemingly, once student expression falls outside the category of political speech, school administrators are given broad authority to look away from the effect of the student expression and instead to regulate based on the content of the expression. Under *Fraser*, the line between "vulgar and lewd" expression and constitutionally protected speech is arguably blurred.[94] *Fraser* marked the Court's increasing deference to school authorities categorizing student expression as "vulgar" or "lewd." When student expression is deemed to be vulgar or lewd, as opposed to disruptive, a school is acting "entirely within its permissible authority in imposing sanctions" because construing the First Amendment to permit such speech "would undermine the school's basic educational mission."[95] Under *Hazelwood*, any student speech expressed through the medium of a school-sponsored activity is subject to regulation as long as the regulation is "reasonably related to legitimate pedagogical concerns."[96] Thus, even political or other nonvulgar expression appears to be subjected to administrative regulation if it is expressed through a school-sponsored activity. Clearly, since *Fraser* and *Hazelwood*, the constitutional protection of student expression in our public schools today is far less than what it was afforded when Justice Fortas found that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the market place of ideas."[97]

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94. Justice Brennan found it "difficult to believe" that Fraser's nomination speech was obscene or vulgar. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986) (Brennan, J., concurring). Indeed, Justice Brennan felt that Fraser's speech was "far removed from the very narrow class of 'obscene' speech which the Court has held is not protected by the First Amendment." *Id.* at 688.

95. *Fraser*, 478 U.S. at 684-85.

96. *Hazelwood*, 484 U.S. at 273.

97. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 512 (1986) (quoting Keyishian v. Board. of Regents, 385 U.S. 589, 603 (1965)).